

## **REMARKS**

### **I. Pending Claims**

Claims 1-91 are pending in this application. No claim has been amended by this response.

### **II. Claim Rejections**

The M.P.E.P. requires an examiner to provide evidence of some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to combine reference teachings. M.P.E.P. § 2143. In the present case, the Examiner has failed to satisfy at least this criterion. Instead, the Examiner has heavily relied upon prior art teachings of the individual elements of the presently claimed invention while ignoring the teachings of the cited references as a whole. As discussed in further detail below, Applicants submit that the Examiner's rejections are improper and should be withdrawn.

#### **A. U.S. Patent No. 5,976,195 to *de la Mettrie et al.* in view of U.S. Patent No. 4,852,849 to *Grollier et al.***

The Examiner has maintained the rejection of claims 1-39 and 41-91 under 35 U.S.C. § 103(a) as unpatentable over U.S. Patent No. 5,976,195 to *de la Mettrie et al* ("*de la Mettrie*") in view of U.S. Patent No. 4,852,849 to *Grollier et al* ("*Grollier*").

Applicants respectfully traverse this rejection.

In the Office Action, the Examiner alleges that because *de la Mettrie* teaches a dye composition comprising at least one cationic or amphoteric polymer such as a quarternary polyammonium polymer (See col. 7, lines 19-24), this implies that more than one polymer may be used in a dye composition. *Final Office Action*, p. 2. Further,

the Examiner contends that *de la Mettrie* suggests the use of thickeners and fatty alcohols in hair dyeing compositions. *Id.* pp. 2-3. The Examiner then relies on *Grollier* for a teaching of alleged equivalency between quaternary polyammonium polymers of cyclohomopolymers and poly(quarternary ammonium) compounds. *Id.* at p. 3. *Grollier* is also relied upon by the Examiner for the alleged teaching of the claimed thickeners and fatty alcohols. Based on these references' disparate teachings, the Examiner concludes that because both references are in the same art of hair dyeing "a person of ordinary skill in the art would be motivated to modify the primary reference by incorporating more than one cationic quaternary polyammonium polymer with fatty alcohol components and thickeners as taught by *Grollier* with a reasonable expectation of success for conditioning." *Id.*

Applicants disagree. Contrary to the Examiner's allegations, there would have been insufficient motivation to combine the teachings of *de la Mettrie* and *Grollier* to arrive at the presently claimed invention, as such a combination ignores teachings in the primary reference that lead away from it. Further, the proposed combination of teachings involves improper picking and choosing without particular motivation. Specifically, arriving at the presently claimed invention would require at least the following:

- (1) ignoring the teaching away of *de la Mettrie* that traditional thickeners resulted in dyed fibers with a dull shade; (col. 1., lines 41-46);
- (2) ignoring the use of cationic polymers as an optional ingredient in *de la Mettrie*; and

- (3) choosing a cationic polymer from the numerous polymers listed in cols. 2-12 of *Grollier*,

With regard to point (1), *de la Mettrie* actually teaches away from the use of *Grollier*'s disclosed thickeners. Thus, no reason would have existed to add *Grollier*'s thickeners to *de la Mettrie*'s composition as urged by the Examiner. *Grollier* discloses that the thickeners used in its invention include "sodium alginates, gum Arabic and cellulose derivatives . . . ." *Grollier*, col. 13, lines 32-34. *De la Mettrie*, however, sought to replace these "traditional thickeners," such as hydroxycelluloses, noting that these thickeners resulted in dyed fibers with a dull shade and made it necessary to increase the amount of dye, solvent and surfactant used in hair dye compositions if an intense shade was desired. *De la Mettrie*, col. 1, lines 41-46. Thus, no motivation would have existed to add *Grollier*'s claimed thickeners to *de la Mettrie*'s compositions.

Secondly, with regard to point (2), *de la Mettrie* relates to a dye composition comprising "at least one dye precursor, optionally one or more couplers, and at least one anionic amphiphilic polymer containing at least one hydrophilic unit and at least one allyl ether unit containing a fatty chain." Col. 1, lines 6-11. *De la Mettrie* later discloses that its compositions may contain "at least one cationic polymer **or** amphoteric substantive polymer." Col 7, lines 19-21 (emphasis added). This disclosure suggests that cationic polymers do not have to be used in *de la Mettrie*'s compositions at all. Rather, the composition could include only amphoteric polymers and result in a perfectly functional dyeing composition. Thus, one skilled in the art would not seek to optimize the use of cationic polymers in a dyeing composition based on *de la Mettrie*'s rather cursory disclosure.

Third, not only does *de la Mettrie* provide no basis for a composition comprising cationic polymers, *Grollier* provides no suggestion to incorporate the quaternary polyammonium polymers of cyclohomopolymers into a composition of *de la Mettrie*. As argued previously, *Grollier* discloses extensive lists of possible ingredients, which can potentially lead to an extremely large number of potential compositions. Specifically, within the cationic polymer class, one of ordinary skill in the art would have been forced to choose between thirteen categories of cationic polymers that can be used in accordance with its invention (col. 2 - col. 8), as well as eight additional categories of amphoteric polymers that can be used instead (col. 8 - col. 11). Thus, *Grollier* does not suggest, out of the number of possible cationic polymer types disclosed, that the claimed polymer is particularly desirable, as required by law.

Moreover, the disclosure of these various cationic polymer types is not evidence that these polymers are equivalent, as stated by the Examiner in the Final Office Action. *Final Office Action*, p. 3. Rather, in order for an Examiner to rely on equivalence as a rationale for supporting an obvious rejection, "the equivalency must be recognized in the prior art, and cannot be based on the applicant's disclosure or the mere fact that the components at issue are functional . . . equivalents." M.P.E.P. § 2144.06. Contrary to these instructions, the Examiner has improperly supported the rejection on (1) the present disclosure and (2) alleged functional equivalence. Thus, for at least these reasons, Applicants respectfully request the Examiner withdraw this improper rejection.

**B. De la Mettrie in view of Grollier and further in view of U.S. Patent No. 5,538,517 to Samain**

The Examiner has also rejected claim 40 as unpatentable over *de la Mettrie* in view of *Grollier* and further in view of U.S. Patent No. 5,538,517 to *Samain* ("*Samain*"). Applicants respectfully traverse this rejection as well.

The Examiner again relies on alleged equivalency to support the rejection. The Examiner contends that *Samain* clearly teaches that enzymes as oxidizing agents are equivalent to hydrogen peroxide, thus, a person of ordinary skill in the art would have been motivated to modify *de la Mettrie* and *Grollier* by substituting an enzymatic source for hydrogen peroxide. *Office Action*, p. 3. Applicants submit that the Examiner has overstated the teachings of *Samain*.

At best, *Samain* discloses that hydrogen peroxide and an enzymatic source of hydrogen peroxide, such as a peroxidase enzyme, may be used interchangeably in a specific dyeing composition based on indole derivatives, as disclosed therein. *Samain* does not even discuss the possibility of enzymatic sources and hydrogen peroxide being interchangeable in a composition comprising other oxidation dyes and also comprising cationic polymers. Indeed, *Samain* never even mentions the use of cationic polymers in its compositions except perhaps for a passing statement that its compositions may comprise additional adjuvants. Col. 4, lines 48-54. Accordingly, *Samain* provides no motivation to make the alleged modification and Applicants respectfully request that the Examiner withdraw this improper rejection.

**III. Unexpected Results**

The Examiner apparently believes that a proper prima facie case of obviousness has been set forth and, thus, advises Applicants to provide data to show the superiority

and non-obviousness of the claimed invention. *Final Office Action*, p. 4. Applicants submit, however, that the Examiner's request for unexpected results is unwarranted. The Federal Circuit has noted that "the Examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a prima facie case of unpatentability." *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). If the Examiner fails to proffer "a prima facie case of unpatentability, then without more the applicant is entitled to grant of the patent." *Id.* In this case, the Examiner has not met his burden with "substantial evidence" for the reasons set forth above. *In re Zurko*, 258 F.3d 1379, 1384 (Fed. Cir. 2001). Thus, Applicants need not set forth any evidence of nonobviousness.

#### IV. Conclusion

In view of the foregoing remarks, Applicants respectfully request the reconsideration and reexamination of this application and the timely allowance of the pending claims. Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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Dated: April 28, 2004

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